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90-1404

Supreme Court, U.S.
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NO. 90-1404

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JONATHAN C. SCOTT,

Petitioner,

vs

ESTATE OF JENNIE MANDEL BARNETT, RHODA HERSCHLER GREENBERG AND MICHAEL HERSCHLER,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO, TENTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state court constitutionally may refuse to enforce a default judgment rendered in another state when, following a plenary hearing, it finds that the first court lacked either subject matter or *in personam* jurisdiction, or both, over the defendants against whom enforcement of the purported judgment is sought.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Estate of Jennie Mandel Barnett, Rhoda Herschler Greenberg and Michael Herschler respectfully request this Court to deny the petition for writ of certiorari seeking review of the opinions of the Court of Appeals of Ohio, Tenth Appellate District (hereinafter "Court of Appeals") which is reproduced beginning at pages A.2 and A.8, respectively, of Petitioner's Petition for Writ of Certiorari.

STATEMENT OF FACTS AND OF THE CASE

Unfortunately, Petitioner's Statement of the Case contains inaccurate statements. Jennie Mandel Barnett died September 24, 1982, domiciled in Franklin County, Ohio. The Franklin County Probate Court appointed Respondent Rhoda Herschler Greenberg executor of her estate on November 5, 1982.

On January 24, 1983, Petitioner's Attorney wrote a letter to Respondent Greenberg, as executor, demanding return to him of certain diamond rings allegedly comprising the *res* of a supposed oral trust agreement made between Petitioner's father, Paul Scott, as trustor, and the decedent, who was Paul Scott's mother, as trustee. Petitioner alleged that he was the beneficiary of this supposed trust. The attorney's letter warned that if Respondent failed to return the rings by February 4, 1983, Petitioner would file suit against the estate for money damages. Respondent Greenberg made no response whatever to the attorney's letter.

Not until seventeen months after the deadline given for return of the rings, namely, in June, 1984, did Petitioner file his lawsuit for damages; and he filed in a state court in New York, not in Ohio. In addition to naming the estate as a defendant, he sued Mrs. Greenberg individually and her former husband, Michael Herschler, both Ohio residents. Petitioner alleged that the individual defendants obtained the subject rings from the decedent and converted them.

None of the defendants (Respondents herein) filed a responsive pleading or otherwise appeared in the New York action. As a result, that court entered a default judgment against the defendants for money damages, the judgment Petitioner sought to enforce in the Ohio proceedings below.

Respondents herein filed timely motions in the Franklin County, Ohio common pleas court to vacate the foreign judgment after Petitioner had it certified and filed in that court. The individual defendants argued that none of the provisions of the New York "long-arm" statute applied to them. The estate contended that the alleged trust agreement never, in fact, was made, and therefore, that New York lacked personal jurisdiction over the decedent and/or her estate under the long-arm statute. Further, the estate maintained that the Ohio "non-claim" statutes, Sections 2117.06, 2117.11, and 2117.12, Ohio Revised Code, barred Petitioner's claim, inasmuch as the claim, namely, the demand for return of the rings, had been rejected as a matter of law by the executor's absolute failure to respond to it by February 4, 1983, the deadline, and inasmuch as Petitioner had failed to file his lawsuit within two months following rejection of the claim, as required by Section 2117.12

After a full hearing on the motions, at which Respondents Greenberg and Herschler testified, the court agreed with the contentions made by Respondents that the New York court lacked jurisdiction over them, and that the non-claim statutes barred Petitioner's claim against the estate. Therefore, it vacated the foreign judgment. Neither Petitioner nor his father nor any witnesses on their behalf were present at the hearing, although they were represented there by their attorney who cross-examined the witnesses.

In its opinion of May 10, 1990, the court of appeals did not disturb the trial court's factual findings, but remanded the matter to that court, instructing it to specifically consider and discuss the applicability to Respondents of the New York long-arm statute. In its opinion of August 28, 1990, reconsidering its first decision, the court of appeals

further agreed that Petitioner's attorney's aforesaid letter triggered the operation of the Ohio non-claim statutes in favor of the estate; however, it remanded for the common pleas court to determine whether the estate waived that defense by failing to raise it in New York. See, Petition for Writ of Certiorari at A.4 and A.5.

On November 28, 1990, the Ohio Supreme Court overruled the parties' respective motions directing the court of appeals to certify its record, finding that no substantial constitutional question was involved. See, Petition for Writ of Certiorari at A.1. That action resulted in Petitioner's present petition for writ of certiorari in this Court.

REASONS WHY THE WRIT SHOULD BE DENIED

Prior decisions of this Court and lower courts are controlling and support the opinions below. Furthermore, other authorities support the decisions below.

A court must have both *in personam* and subject matter jurisdiction in order to render a valid judgment. Restatement (Second) of Judgments, Sec. 81 (1982). If it lacks either, its judgment is void and is not entitled to recognition in the state where rendered or elsewhere. Id.; Restatement (Second) Conflict of Laws, Secs. 104-105 (1971).

A court's jurisdiction is always open to judicial inquiry in a subsequent action to enforce that court's judgment, especially if the judgment was rendered by default; and such inquiry is not prevented by the Full Faith and Credit clause of the Constitution. *Adam v. Saenger*, 303 U.S. 59, 62 (1938). And, as a corollary, if a matter of fact upon which the court's jurisdiction depends was not litigated in the first action, as necessarily is the case when the judgment is by default, that matter may be adjudicated in the subsequent judgment-enforcement action. *Id.*; Restatement (Second) of Judgments, Sec. 81 comment a (1982). New York recognizes this principle. *Royal Zenith Corp. v. Continental Ins. Co.*, 63 N.Y.2d 975, 473 N.E.2d 243 (1984).

In this case, the existence or not of the alleged oral trust agreement is a jurisdictional fact. That is, if the agreement existed and was made in New York, New York probably would have *in personam* jurisdiction over the decedent and/or her estate pursuant to that provision of the long-arm statute referring to "transact[ing] any business within" that state. See, Petition for writ of Certiorari at 19. But New York would not have jurisdiction if the supposed agreement never, in fact, had been made, notwithstanding

the fact the decedent may have been a New York resident at one time. *Inkelas v. Inkelas,* 58 Misc.2d 340, 295 N.Y.S.2d 350 (Sup. Ct. 1968); *Sun System Prefabricated Solar Greenhouses, Inc. v. Venuti,* 596 F. Supp. 1516 (E.D.N.Y. 1984).

On page 18 of his Petition for Writ of certiorari, Petitioner states that "[i]t is unrefuted" that the decedent entered into the alleged trust agreement. However, the evidence presented in the Ohio proceedings (that being, of course, the first time Respondents' position was presented in a judicial forum on these issues) established that no such agreement had been entered into. That evidence clearly showed that the decedent was the absolute, unconditional owner of the subject rings, not a trustee of them. Furthermore, Respondents presented uncontradicted, unimpeached evidence that the individual defendants (Respondents) had committed no acts that would have brought them within the coverage of the long-arm statute. Thus, the Ohio courts were entirely justified in so finding as fact. And as a matter of law, they were justified in finding that New York acquired no personal jurisdiction over any of the Respondents.

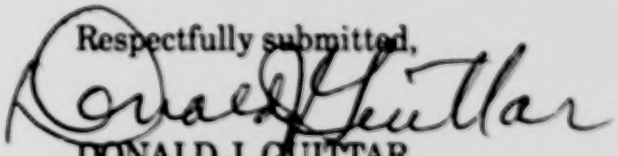
In addition, as indicated above, the Ohio courts have held that the Ohio non-claim statutes apply in this case if they were not waived. Respondents will cite ample Ohio authority on remand to the common pleas court to the effect that those statutes are jurisdictional and that they may not be waived. The correctness of Ohio's interpretation of its statute in this case, of course, is a matter of state law, and does not raise a federal question. Therefore, Petitioner's claim was "forever barred" (Section 2117.12, Ohio Revised Code, *supra*), and his New York "judgment" is not enforceable against the Respondent estate in Ohio. *In re Rettig,* 8 Ohio Misc. 38, 216 N.E.2d 924 (P.C. Hamil-

ton Co. 1964), *aff'd. without opinion* (Ct. App. No. 9613) (May 3, 1965) (refusing to enforce foreign judgment rendered contrary to non-claim statutes); *Crosson v. Conlee*, 745 F.2d 896, 902-03 (4th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (refusing to permit such a judgment to be entered in first instance). See, *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 516-17 (1953).

CONCLUSION

When asked to enforce the New York default judgment against Respondents, the Ohio courts were entitled to inquire into the New York court's *in personam* and subject matter jurisdiction, or lack thereof. After a plenary hearing at which Respondents testified, and at which Petitioner and/or his witnesses were entitled to testify, but chose not to, the Ohio court was entirely justified in finding that New York, in fact, did not acquire jurisdiction over Respondents. It was further justified in finding that Petitioner did not comply with the Ohio non-claim statutes when he failed to file suit within two months following the rejection of his claim against the estate. Consequently, the Ohio court was entitled to vacate the judgment as to all Respondents and to refuse to enforce it. Petitioner thus has demonstrated no error below justifying intervention by this Court.

Respectfully submitted,



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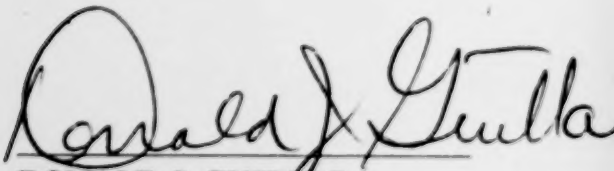
CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing, Respondents' Brief in Opposition have been served upon petitioner, Jonathan C. Scott, by mailing such copies to the office of petitioner's counsel of record, Ronald Podolsky, 15 Park Row, New York New York 10038, by U.S. Mail First Class postage prepaid, this 26th day of March, 1991.

I further certify that all parties required to be served have been served.



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